IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AIBA N. HODROJ, Appellant.	No. 37344-1-II UNPUBLISHED OPINION

Armstrong, J. — Aiba N. Hodroj appeals his felony judgment and sentence for methamphetamine possession. He argues that the State failed to prove his guilt beyond a reasonable doubt; that the trial court erred in not instructing the jury that it had to unanimously agree on the incident for which it was convicting him; and that his counsel ineffectively represented him by stipulating that he was on community custody when he was arrested. In a statement of additional grounds (SAG), Hodroj asserts that the trial court abused its discretion by refusing to exclude certain witnesses from the courtroom during parts of his trial. We affirm.

FACTS

In November 2008, Vancouver police officers entered Tim Duke's residence looking for Joseph Hanson, whom they suspected of violating his community custody conditions. According to Detective Brian Acee, as he and three other officers approached the house, Hanson stepped outside the front door. When the officers identified themselves, Hanson ran back into the house. The officers ran in the house after him.

Several people inside the house scattered when the police entered. Officer Fili Matua recognized Aiba Hodroj from a photo and called his name. Hodroj ran into the east bedroom.

Matua testified that when he caught up to Hodroj in the east bedroom, Hodroj was about to throw something in his left hand into the closet. After Matua told Hodroj to stop a second time, Hodroj got down on the floor. Matua handcuffed Hodroj and noticed a glass pipe and a plastic bag containing a white crystalline substance on the floor where Hodroj had been lying. Duke, the resident of the house, was also in the east bedroom at the time of Hodroj's arrest. The white substance in the bag and the residue on the pipe both tested positive for methamphetamine.

The State charged Hodroj with possession of methamphetamine based on the bag and pipe he dropped immediately prior to his arrest. The State also charged Duke with possession of methamphetamine based on the contraband that officers found on a shelf in the east bedroom and in the bedroom closet.

At trial, Hodroj moved to exclude Matua from the courtroom during Acee's testimony to prevent Acee's testimony from influencing Matua's testimony. The trial court denied the motion.

Duke testified at Hodroj's trial wearing prison clothes and shackles.[1] He claimed that all of the methamphetamine in the bedroom belonged to him, including the glass pipe and bag Matua found on the floor. Duke stated that the glass pipe and baggie were not near Hodroj when Matua handcuffed Hodroj. Nevertheless, the jury convicted Hodroj of possessing methamphetamine.

ANALYSIS

I. Sufficiency of the Evidence

Hodroj asserts that the State failed to prove methamphetamine possession beyond a reasonable doubt.

[1] The record does not show that Duke was in prison clothes and shackles, however neither party disputes this assertion and both brief the issue as a fact.

Evidence is sufficient to support a conviction if, taken in the light most favorable to the State, it allows any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In testing the sufficiency of the evidence, we do not weigh the persuasiveness of the evidence. Rather, we defer to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

To convict Hodroj, the State had to prove that he possessed a controlled substance. RCW 69.50.4013(1). Here, the State claims that Hodroj actually possessed the controlled substance, which means that the controlled substance was in his personal custody. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (quoting *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)). Actual possession can be proven by circumstantial evidence. *State v. DuPont*, 14 Wn. App. 22, 25, 538 P.2d 823 (1975). Viewing the evidence most favorably to the State, we find sufficient evidence to prove that Hodroj possessed the methamphetamine in the pipe and bag.

Matau testified that Hodroj dropped several items on the bedroom floor when Matau called out to him a second time. The items that Matua recovered from the floor were the bag and the glass pipe. Moreover, Hodroj fled when the officers first entered the home, and he was about to throw the items when Matua caught up to him in the bedroom. This evidence was more than sufficient for the jury to find beyond a reasonable doubt that Hodroj actually possessed the drugs found in the bag and the pipe.

II. Unanimity Instruction

Hodroj next contends that the trial court should have instructed the jury that it had to unanimously agree on which object, the bag or the pipe, was the basis of its conviction.

A defendant has the right to have a unanimous jury find that he or she has committed the charged crime. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Where multiple acts could constitute the crime charged, the State must either elect which particular criminal act it will rely on for conviction, or the trial court must instruct the jury that it must agree on the same underlying criminal act. *State v. Vander Houwen*, 163 Wn.2d 25, 38, 177 P.3d 93 (2008) (quoting *Kitchen*, 110 Wn.2d at 411).

Here, the State did not present evidence of multiple acts. *Cf. State v. Price*, 126 Wn. App. 617, 624, 109 P.3d 27 (2005) (trial court should have given unanimity instruction in aggravated first degree murder case when the State presented evidence of five assaults that occurred within five years, any one of which could have been the basis for the underlying assault, but the error was harmless). Rather, the State proved that Hodroj held both the plastic bag and the pipe and dropped them to the floor at the same time. And both items contained methamphetamine. Because there was only one criminal act, the trial court was not required to instruct the jury on unanimity.

III. Ineffective Assistance of Counsel

Hodroj faults his counsel (1) for stipulating that Hodroj was on community custody at the time of his arrest; and (2) failing to object to the defense witness testifying before the jury while wearing shackles and prison clothes.

The state and federal constitutions guarantee criminal defendants the right to reasonably effective representation. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We begin our analysis of a claim that counsel ineffectively represented a defendant by presuming that counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted). To persuade us otherwise, the defendant must show (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) that defense counsel's flawed representation prejudiced the defendant. *McFarland*, 127 Wn.2d at 334-35. To show prejudice, there must be a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335 (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

A. Stipulation

Hodroj maintains that his counsel should not have stipulated that Hodroj was on community custody at the time of his arrest, thereby elevating his offender score.

At sentencing, "[t]he State bears the burden of proving the existence of prior convictions" before the court may use them in calculating an offender score. *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). But Hodroj cannot show that if counsel had contested his community custody status, the State could not have proved it. Hodroj's criminal history establishes that he was on community custody at the time of the offense. Thus, Hodroj has not demonstrated that counsel ineffectively represented him by stipulating to his status or that he was harmed by the stipulation.

B. Witnesses Appearance

Hodroj also claims that his counsel should have objected when his witness, Duke, appeared before the jury wearing shackles and prison clothes. Hodroj asserts that his trial counsel fails under both prongs of the *Strickland* test because Hodroj's defense depended almost entirely on Duke's testimony that Duke was the actual possessor of the bag and pipe. Hodroj argues that Duke's credibility was undermined when Duke appeared before the jury wearing shackles and prison clothes. We disagree.

Hodroj cites no Washington case discussing the potential prejudice where a defense witness, while wearing prison clothes, testifies that he or she is the actual perpetrator of the crime for which defendant stands trial. On point, however, is the reasoning in *State v. Rodriguez*, 146 Wn.2d 260, 262, 267, 45 P.3d 541 (2002), where the court recognized that a defendant could be unfairly prejudiced by a witness who testified to a criminal association with the defendant while wearing prison clothes and restraints. The *Rodriguez* court emphasized the purpose and content of the witness's testimony in determining prejudice. *Rodriguez*, 146 Wn.2d at 267-68. In that case, the witness testified that he was criminally associated with the defendant while wearing prison clothes that clearly denote guilt. *Rodriguez*, 146 Wn.2d at 267. The *Rodriguez* court reasoned that because the content of the witness's testimony connected the defendant to criminal activity, the witness's appearance had the potential to prejudice the defendant's right to a presumption of innocence. *Rodriguez*, 146 Wn.2d at 267.

Unlike the testimony in *Rodriguez*, Duke's testimony incriminated only *himself*. He testified that all of the contraband in his home belonged to him, including the bag and pipe. In

addition, he testified that he had been arrested at the same time as Hodroj and then convicted of possessing methamphetamine. Hodroj's attorney used this evidence to argue, "Do you doubt [the methamphetamine] was [Duke's]? He's a druggie and he's honest about it. He has no qualms about it." Report of Proceedings at 135. Under these circumstances, Hodroj has not shown that his attorney's failure to object to Duke's appearance prejudiced him. Hodroj's claims that counsel ineffectively represented him fail.

IV. Failing to Move to Exclude A Witness

In his SAG, Hodroj argues that the trial court abused its discretion in allowing Matua to be present during Acee's testimony.

The trial court has discretion to exclude witnesses from the courtroom. *State v. Sexsmith*, 138 Wn. App. 497, 510, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008) (citing *State v. Johnson*, 77 Wn.2d 423, 428, 462 P.2d 933 (1969)). We will overturn a trial court's decision only where the defendant can show he or she has been prejudiced by an abuse of discretion. *State v. Adams*, 76 Wn.2d 650, 659, 458 P.2d 558 (1969), *reversed on other grounds by Adams v. Washington*, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971) (citations omitted).

In this case, Hodroj's counsel moved to exclude Matua during Acee's testimony out of concern that Acee's testimony would influence Matua's testimony. The trial court heard argument on the issue and denied the motion. Hodroj has not made any showing that he was prejudiced by the trial court's exercise of discretion. *See Adams*, 76 Wn.2d at 659. Matua testified to the critical facts of Hodroj's handling and dropping of the methamphetamine. Acee

was not in the bedroom during these events and offered no testimony corroborating Matua's version of what happened. Thus, as to the essential facts, Acee and Matua could not influence each other's testimony. Hodroj has not shown that the trial court abused its discretion in denying his motion to exclude Matua.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Hunt, J.